American Geri-Care, Inc. *and* Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO. Case 29–CA–9571

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 December 1982 Administrative Law Judge Harold B. Lawrence issued the attached decision. The Respondent, American Geri-Care, Inc., filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, inter alia, that the Respondent committed two separate violations of Section 8(a)(1) of the Act by granting wage increases in order to discourage employees' union activity and by granting a tuition reimbursement plan for the same purpose.[1] The judge therefore recommended the Board's traditional remedy for 8(a)(1) violations. In addition, however, he treated the alleged unfair labor practice allegations as objections to an election and, even though the pending representation case was not before him, he ordered the Region to open the ballots to the rerun election and, if neither Union had received a majority of the valid ballots, he ordered the Regional Director to conduct a new election. Moreover, because he treated the alleged 8(a)(1) violations as objections he examined the Respondent's conduct in light of the critical period to the election instead of applying 10(b)'s 6-month statute of limitations for unfair labor practice violations. Thus, he found that the Respondent's announcement and implementation of a wage increase in July 1981 was a violation of the Act even though the unfair labor practice charge alleging that this conduct was unlawful was not filed until March 1982. The Respondent excepts to these findings and argues that the violations should be dismissed on their merits and on the ground that they are barred by Section 10(b) of the Act.

The Respondent is correct that the judge only had before him allegations of unfair labor practices, and not objections to the election, since the representation case was not consolidated with this case. Thus, the 6-month statute of limitations, not the critical period before the election, applied in determining the legality of the Respondent's conduct. We further find in agreement with the Respondent that the Board's consideration of the wage increases as an unfair labor practice was time-barred because the increases were both announced and implemented outside the 10(b) 6-month period.[2] With respect to the tuition reimbursement plan, however, we find, as explained below, that the Respondent announced and implemented its tuition reimbursement plan in its final and complete form within the 6-month period, and that we may therefore consider whether the announcement and implementation of this plan violated Section 8(a)(1) of the Act. We find, for the reasons stated below, that it did violate Section 8(a)(1), and we therefore adopt the judge's finding in this regard.

As found by the judge, the Respondent first discussed the tuition reimbursement plan with the nurses in July 1981 at a meeting at which it announced the wage increase. A typed proposal was thereafter disseminated to the nurses, and the nurses objected to a requirement that they must maintain a B+ grade point average in order to be reimbursed for their tuition expenses. In December 1981 Director of Nursing Services Evelyn Milano met with the nursing home's administrator, Gary Stern, and discussed the nurses' objections. They agreed to drop the grade requirement, and a copy of the plan was distributed with the employees' paychecks in January 1982.[3] Thus, we find that the plan was formulated and implemented within the 10(b) period.

We further find, in agreement with the judge, that the Respondent granted the benefit of the tuition reimbursement plan in order to affect the outcome of the second election on 12 March. As

[1] The procedural background of this case is as follows. The unfair labor practice charge which gave rise to this case was filed on 3 March 1982 by Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO. A rerun election was held 9 days after on 12 March, with two unions, Local 6 and Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL–CIO, on the ballot. The ballots to the election were impounded because of the pending unfair labor practice charge. Objections to the election were also filed, and they are still pending.

Prior to the rerun election, a first election was held on 20 December 1979, in which both Local 6 and Local 144 participated. Local 6 filed objections and unfair labor practice charges. On 15 June 1981 Administrative Law Judge Barry D. Morris issued a decision in a consolidated representation and unfair labor practice case in which he sustained an objection based on the Respondent's having made an unlawful promise of benefits in violation of Sec. 8(a)(1) of the Act. He recommended a second election. Although the Respondent excepted to this decision, it was adopted by the Board on 30 September 1981. The events at issue here occurred between the issuance of Judge Morris' decision on 15 June 1981 and the rerun election in March 1982.

[2] See, e.g., *Durfee's Television Cable Co.*, 174 NLRB 611, 613–614 (1969).

[3] All dates hereinafter refer to 1982 unless otherwise noted.

noted by the judge, granting employee benefits prior to an election is not per se grounds for setting aside the election, but there must be a showing that the timing of the announcement was governed by factors other than the pending election. While a representation case is pending, a respondent must decide whether to grant benefits as if the union were not in the picture; there is no violation of the Act if the respondent would have granted the benefits because of economic circumstances or other factors unrelated to the union. Where a benefit is granted prior to a scheduled election, however, the burden is on the respondent to show the neutral factors which governed its decision.[4]

The judge found, and we agree, that the Respondent failed to establish that its tuition program was justified by business reasons, or that it was the result of any established policy or past practice. To the contrary, Administrator Stern testified that the initial plan was pulled out of the air, and he and Milano, the creators of the plan, contradicted each other even as to the requirements of the final version of the tuition reimbursement plan.

While the Respondent failed to come forward with a business reason for granting the benefit, it used this benefit as part of its campaign against the Union. Thus, Stern asked the employees at a meeting "to trust us and give us the year to prove ourselves." Stern added: "[A]t this point, I just told them that our track record showed that they were not let down." And he referred to the Respondent's benefits as showing that "management was giving benefits, and they [the employees] didn't need to come on to a union to intercede for them with management, for extra pay and benefits." From these statements, the timing of the benefit, and the Respondent's failure to come forward with any business reasons for its actions, we find that the Respondent formulated and implemented the tuition reimbursement plan in order to affect the results of the election in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist from such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Geri-Care, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[5]

1. Substitute the following for paragraph 1(a).

"(a) Announcing or implementing a tuition reimbursement plan or benefits not previously enjoyed under conditions calculated to influence employees in the exercise of their rights to choose freely whether or not they wish to be represented by a labor organization or to reward them for voting against a union, or in any manner to interfere with their freedom of choice."

2. Delete the last paragraph of the judge's decision beginning "IT IS FURTHER ORDERED."

3. Substitute the attached notice for that of the administrative law judge.

[4] *Essex International*, 216 NLRB 575, 576 (1975).

[5] Nothing contained herein should be considered as ordering the Respondent to rescind any benefits conferred on its employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

Accordingly, we give you these assurances:

WE WILL NOT announce or implement a tuition reimbursement plan or other new benefits under circumstances calculated to influence you in your choice of whether or not you wish to be represented by Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO, by Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO, or by any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

AMERICAN GERI-CARE, INC.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. This case was tried before me on August 12 and 13, 1982, at Brooklyn, New York. The charge was filed on March 3, 1982, by Local 6, International Federation of Health Professionals, International Longshoreman's Association, AFL–CIO. On April 15, 1982, a complaint was issued which, as amended at the hearing, alleged that American Geri-Care, Inc., the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, hereinafter referred to as the Act, by granting its employees wage increases and other benefits and improvements in working conditions sometime in November and December 1981 and March 1982 and by instituting a tuition reimbursement program for them around November 1981 and January 2 and February 1982 in order to induce them to refrain from becoming or remaining members of, or otherwise assisting or supporting, either Local 6 or Local 144 of the Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL–CIO, or from voting for either union in a rerun election scheduled for March 12, 1982. The Respondent's answer denied the commission of the acts alleged and denied any violation of the Act. The issue thus presented is whether the granting of wage increases and the institution of the tuition reimbursement program constituted interference with the employees' exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

The parties were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. A post-hearing brief has been filed on behalf of the Respondent but none has been filed on behalf of the General Counsel.

On the entire record and based on my observation of the witnesses, and after consideration of the brief submitted on behalf of the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint and answer raise no jurisdictional issues. I find that the Respondent is a New Jersey corporation which operates the Aischel Avraham Nursing Home at 40 Heywood Street, Brooklyn, New York, providing health care staffing services and related services to elderly persons, and is a health care facility and health-related facility within the meaning of Section 2(13) of the Act. In its annual operations, the Respondent performs services valued in excess of $50,000, of which services valued in excess of $50,000 are performed annually for the Aischel Avraham Nursing Home, the annual gross revenue of which exceeds $100,000. I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find that Local 6, the Charging Party, and Local 144 are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Basic Facts*

The Respondent employs both registered nurses and licensed practical nurses at the Aischel Avraham Nursing Home. The latter are represented under a collective-bargaining agreement with Local 6 but no collective-bargaining agreement is in effect covering the registered nurses. The nursing staff is supervised by Evelyn Milano, director of nursing services, and overall supervision of the Home is exercised by Gary Stern, the administrator.

On October 29, 1979, Local 144 filed a petition for certification as the representative of the registered nurses in a unit consisting of all the registered nurses employed by the Respondent at the Home. A board-supervised election was conducted on December 20, 1979, in which both Local 6 and Local 144 participated. Local 144 filed objections to the election on the basis of unfair labor practices allegedly committed by the Respondent.[1]

On June 15, 1981, Administrative Law Judge Barry D. Morris issued a decision finding the Respondent guilty of certain unfair labor practices and recommending, among other things, that an order be made setting aside the election held on December 20, 1979, and remanding the case to the Regional Director for Region 29 for the purpose of conducting a new election. Judge Morris expressly sustained an objection to the election which was based on Respondent's having made an unlawful promise of benefits in violation of Section 8(a)(1) of the Act. The Board affirmed Judge Morris' decision on September 30, 1981, expressly upholding his finding that Milano had promised employees a good "contract" if they voted for management. Thereafter, the parties agreed on a date for a new election, and an order scheduling an election was issued by the Regional Director on January 18, 1982, and by agreement the same was adjourned to March 12, 1982, at which time it was held. By that time, of course, the charge underlying the present case had been filed. The ballots cast in that election have been impounded pending the outcome of this case.

The evidence clearly establishes what the Respondent did between June 15, 1981, and March 12, 1982; what is in issue is the Respondent's true motivation for its acts. The Respondent granted the registered nurses a series of across-the-board wage increases beginning in July 1981, and claims to have programmed additional increases for the registered nurses pursuant to a new wage policy announced at that time, well before the Respondent even contemplated a rerun election. Under the new policy, increases would follow automatically at 6 months and 12 months after date of hire.

[1] Case 29-RC-4765.

The new wage policy introduced in July 1981 was as follows: The base salary of the registered nurses was raised. As of July 1981, registered nurses who had been employed by the Respondent for less than 6 months (having been hired after January 1, 1981) and newly hired nurses were to be paid at the rate of $9.50 per hour. Upon completion of 6 months' employment, they would receive $10. On the anniversary date of their employment, they would be raised to $10.375. Registered nurses who had been hired prior to January 1, 1981, and thus had more than 6 months' service as of July 1981 would be raised to $10 immediately and, on the anniversary dates of their employment, would receive $10.375. These were automatic increases.

A tuition reimbursement program, under which the registered nurses would be reimbursed for the cost of continuing professional education courses, was also instituted. The Respondent contends that at a meeting held in July 1981 the nurses were advised that such a program was under consideration and they were promised that it would be instituted in January 1982, and that a further meeting was held on the same subject in December 1981. While there is some question about when these meetings occurred or whether they occurred at all, a tuition reimbursement program was instituted in January 1982. A variant of the program was later extended to the licensed practical nurses. (The General Counsel questions the dates of these meetings or whether they occurred at all, suggesting that the program may have been originated at an extremely late date.)

The Respondent conducted a campaign prior to the election of March 12, 1982. Stern spoke to a number of nurses, making the point that the Respondent had always delivered on its promises, and that a union was not needed. When the tuition reimbursement plan went into effect, Stern arranged for an announcement of the terms of the program to be distributed to the nurses with their paychecks in January 1982 and with it a memorandum which in effect stated that they were therewith receiving the reimbursement plan previously promised to them. In addition, a notice announcing the program was posted on a bulletin board for a substantial period of time prior to the March election.[2]

B. *The Preelection Period*

A preliminary determination must be made as to how far back the review of the Respondent's actions should extend. The complaint alleges as violations only actions which occurred within the statutory period of limitation prescribed by Section 10(b) of the Act, but the General Counsel argues for an extremely lengthy critical preelection period, going clear back to Judge Morris' decision and requiring consideration of the Respondent's actions from and after the first wage increase in July 1981.

I consider the Respondent's actions antedating the 10(b) period germane to the issues of this case for several reasons. Firstly, the acts specifically alleged in the complaint need not be pondered in a vacuum; they were patently an outgrowth or a continuation of earlier events and, since their motivation is what is in issue and the Respondent contends that they result from preexisting policies and established practices, it is difficult to see how they can be passed on without consideration of the events of the earlier period. Secondly, if the wage policy and tuition reimbursement program were formulated and announced within a crucial preelection period, I would be compelled to conclude that they were motivated by a design to influence the outcome of the election, even if the date for that election had not yet been set,[3] unless the Respondent furnished convincing evidence that they were in fact dissociated from the impending election.

The date of filing of a petition for an election is normally considered the beginning of the crucial preelection period.[4] When an election has been set aside and a new election ordered, the critical period for the second election begins running from the date of the first election.[5] In the present case, therefore, all actions of the Respondent following Judge Morris' decision on June 15, 1981, fall within that critical period.

C. *The Prima Facie Case*

Both Stern and Milano testified that the Respondent first began to give serious consideration to a policy of wage increases and to a tuition reimbursement program after Judge Morris issued his decision on June 15, 1982. The Respondent instituted these changes during the same period of time in which the Board affirmed Judge Morris' decision, the Respondent and the unions agreed on the date of a new election, and the Regional Director issued an order setting the date of the new election. The General Counsel thus established that the Respondent did so after it became aware, or should have been aware, that there would be another election. In addition, the evidence established that, while the Respondent had on display the tuition reimbursement plan and the wage increases, promised well before the election date was set and implemented piecemeal through the ensuing period almost up to the date of the election, Stern conducted a campaign which dwelt on the Respondent's purported record of fulfilled promises. Such a preelection campaign permits, if it does not mandate, an inference that the

[2] Jack Richard Cunningham, a business agent of Local 6, saw such a notice on a bulletin board at the Home when he visited it on February 26, 1982. He identified the notice as one entitled "Tuition Reimbursement Program for R.N.'s." A copy is in evidence as G.C. Exh. 2.

[3] I do not interpret those cases which have held that an election will not be set aside because of the granting of wage increases before the date of the new election has been set as requiring a similar ruling in all cases in which a date for a rerun election is left open. The cases so holding all involve circumstances which clearly distinguish them from the present case. For example, in *General Industries Co.*, 152 NLRB 1029 (1965), in which the Respondent announced wage increases during the critical period between the date of the first election and the second election and granted additional insurance and other benefits, the trial examiner noted that the new election had not yet been directed, much less scheduled, and expressly found that the respondent had not acted with foreknowledge of the Board's decision and concluded, on review of all the pertinent facts, that the General Counsel's prima facie case had been rebutted. I come to the opposite conclusions in the present case.

[4] *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961).

[5] *Singer Co.*, 161 NLRB 956 (1966). The Respondent's contention that the critical period did not begin until the date of the new election had been set or agreed upon is untenable in the light of the comment made in *Singer Co.*, at fn. 2, to the effect that *Breman Steel Co.*, 115 NLRB 1581 (1956), was implicitly overruled in *Ideal Electric.*

wage increases and the tuition reimbursement program were initiated and implemented as inducements to the nurses to vote against the unions.

Stern testified that he spoke to the day-shift nurses prior to the election on March 12, 1982, telling them that the Respondent had always followed through on past promises; that in the past employees had voted in favor of management because they trusted that after the election management would do the right thing for them and as a matter of fact management had not let them down; and that he was not asking them to take his word but to review his track record, which showed that they got what was promised to them when it was promised. On this basis, he asked them to have confidence in management and vote against the Union. He testified, "My pitch was that I can't promise anything specific, but I have a track record which I feel that will indicate that they can rely that we will do the best thing with our nurses, that we're asking them to vote against the Union."

Stern testified, "I said that we told them that we can't make specific promises, but that we asked, at that point, that people should please trust us for a year, that in the worst case, that if we did not keep the promises after a year, they could always turn to a union . . . and at that point, we just asked them to trust us and give us a year to prove ourselves. And at this point, I just told them that our track record showed that they were not let down and we asked them to look at our track record and vote against the Union." When asked whether he specifically mentioned that he had promised them a tuition reimbursement plan and had given it to them his answer was, "I don't recall." When asked if he had specifically promised a new package of benefits, including wage increases and better health and dental coverage, Stern responded, "In July, 1981, we gave it to them. And I assume this is one of the examples I brought to them to show them that without the prodding of a Union, management was giving benefits."

D. *The Respondent's Defense*

The Respondent contended that the wage increases were given in order to meet standards in the industry in the New York area and thus attract competent personnel, and that they and the tuition reimbursement program were based on policies, plans, or practices which existed well before the second election was scheduled. However, the Respondent offered no evidence to establish that the pattern of increases conformed to general industry practice or to produced any probative evidence on such an issue of the type which has been produced in other cases, such as an industrywide survey made by a recognized employers' or other association, verification of the fact and extent of deviation of the Respondent's wage scale from that of other nursing homes, or surveys taken on an annual or other periodic basis showing what the competition was doing by way of increases, insurance, and other benefits.[6]

Instead, for proof of business need the Respondent rested on testimony by Stern and Milano that in 1981 the proper complement of nurses could not be maintained because they were paying less than the competitors. Instead of the legally required five registered nurses on the day shift, four on the evening shift, and four on the night shift, the Home was staffed in January and February 1982 by only one registered nurse on each floor during the day, with none on the night shift. (There had been only one on night duty in December 1981.)

In order to establish the existence of a preexisting policy, Stern and Milano testified that for a long period of time Milano pressed for wage increases for the nurses and Stern kept putting her off. They had received increases last in January and October 1980. Finally, Stern promised to take matters up with Mr. Rosenbaum, a principal of the Respondent. There was a period of give and take discussions between Stern and Milano to determine what was the least that would be acceptable to the nurses and discussions between Milano and the nurses.

Milano testified that she had been promising the nurses that she would speak to Stern prior to July 1981. Stern testified that he had discussed the tuition plan with Milano either in June or July 1981—that she had mentioned it earlier but "serious talk" only began at that time. Milano's account of the ensuing events is that in July 1981 she called a meeting of the registered nurses which was also attended by the supervisors and the in-service coordinator. The matters discussed were the wage increase, a changeover of the health insurance coverage to a new company resulting in an increase of coverage, and the tuition reimbursement plan. The nurses who attended were primarily from the day shift. Milano told them that the wage increase would be on the next paycheck. The changes in health insurance took effect in July. Milano outlined the tuition reimbursement program as it had been formulated by her and Stern, writing it out on the blackboard. She told them it would be typed up and she would get back to them to get their ideas on the subject, but that the plan would definitely go into effect in January 1982. Milano testified that she discussed it with the nurses from a memorandum which she had written on a piece of yellow paper; this is what she transposed to the blackboard. It was typed up later, and that formulation of the program entitled "Tuition reimbursement Program for R.N.'s," is in evidence as General Counsel's Exhibit 2. The nurses who participated in the discussion of the program objected to a requirement that an "employee must maintain an average of B+ or higher" in order to qualify for reimbursement. Milano told them she would discuss it and get back to them about it.

Milano testified emphatically that, pursuant to her instructions, her notes on the yellow paper, containing the first version of the plan, were typed up by her secretary approximately a week after the July meeting and were distributed. She was positive that it had been disseminated because she received comments on it from nurses who had not attended the meeting. Milano met with Stern again and communicated the nurses' objection to the grade requirement. Around the end of December 1981, a

[6] *Astronautics Corp.*, 164 NLRB 623, 630 (1967); *Mallory Controls Co.*, 214 NLRB 616 (1974).

new proposal was drafted which was basically the same program but without the grade requirement. A copy of this program is in evidence as Respondent's Exhibit 1. Copies of the plan were disseminated to the nurses with their paychecks in January 1982 with a covering memorandum stating, "[A]ttached please find the tuition reimbursement package as promised."

Stern testified that the written draft from which the plan was typed up was written by him, and that it may have been done in June instead of July. He testified that he gave the draft to Milano. Though he professed to having to speak to Rosenbaum about such matters, he testified that he told Milano to promise the nurses that the program would be implemented in January 1982.

Stern asserted that no promises were made to individual employees, his basic pitch in the campaign being that a union was not needed because the Respondent always kept its promises. In this respect, the testimony of Milano and Stern is supported by the testimony of nurses Softleigh and Mills, who stated that no specific promises of pay raises were made to them. There is no evidence in the record that anyone acting on behalf of the Respondent promised the employees any increases or benefits directly conditioned on their voting against the unions.

E. *Analysis*

This case is governed by several well-settled propositions. Granting employee benefits prior to an election is not per se grounds for setting aside the election, but there must be a showing that the timing of the announcement was governed by factors other than the pendency of the election. While a representation case is pending, an employer must decide whether or not to grant benefits as if the union were not in the picture; there is no violation of the Act if the employer would have granted the benefits because of economic circumstances unrelated to union organization, but there is a violation if the employer's course is altered by virtue of the union's presence. The Board will regard the timing as calculated to influence the employees in their choice of a bargaining representative in the absence of the required showing. The burden of showing other factors is on the employer.[7]

Taking into consideration the Respondent's entire pattern of conduct, it is apparent that the Respondent dangled promises of wage increases and tuition reimbursement before the employees from July 1981 to election time by holding meetings and otherwise stimulating discussion of the promised benefits among the registered nurses over a protracted period of time. The Respondent extracted maximum effect from its promises and grants of benefits by protracting their implementation. The acts alleged in the complaint, necessarily limited to acts which occurred within the 6 months preceding the filing of the charge, were only the final events in a series of actions which were tantamount to an implied promise of future wage increases and benefits "having as its object to dissuade employees from continuing their support for the Union" and thus constituting interference with the employees' exercise of their Section 7 rights and a violation of Section 8(a)(1) of the Act.[8] This was a promise of specific increases.[9] Such "husbanding" of benefits until immediately prior to an election has been recognized as timing which is violative of the Act even if a legitimate business purpose exists for such benefits.[10] Even if the Respondent's earlier actions in July and August 1981 are deemed to be beyond the critical preelection period, they still form part of the conduct pattern which may be considered in evaluating the actions alleged in the complaint.[11] The Respondent wholly failed to prove that the wage increases and the tuition reimbursement program were instituted for business reasons dissociated from the union campaign or that their timing was independent of it. The Respondent also failed to prove that they resulted from any established policy or past practice.

1. Failure of the Respondent's justification on the basis of business necessity

The Respondent asserted that its actions were prompted by the fact that staffing had deteriorated to the extent that legally mandated staffing was not being maintained, especially in the months of December 1981 and January 1982, but conceded that the wage increases and the tuition reimbursement program were announced in the preceding July. Other than an incidental remark by Stern, quoted below, there is no evidence that at that time a shortage of personnel existed or was anticipated. During the ensuing autumn and winter there was no sense of urgency about attracting personnel. Stern testified that it took half a year to resolve the question of the grade requirement in the tutition reimbursement program because there was nothing urgent about it: the program was set for the following January and he had enough other catastrophes on a daily basis to keep him busy. I therefore conclude that the asserted shortage of registered nurses

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[7] *Essex International*, 216 NLRB 575 (1975); *McCormick Stone Co.*, 158 NLRB 1237, 1242 (1966); *Glosser Bros., Inc.*, 120 NLRB 965 (1958); *Northwest Engineering Co.*, 148 NLRB 1136, 1145 (1964), enfd. 376 F.2d 770 (D.C. Cir. 1967).

[8] *Colonial Haven Nursing Home*, 218 NLRB 1007, 1008 (1975), enfd. 542 F.2d 691 (7th Cir. 1976).

[9] Clearly distinguishable from the facts of this case are those of *American Laundry Machinery Co.*, 107 NLRB 511 (1953), in which the Board found that an announcement that "in keeping with the Company's progressive policy, since January 1953, management has been working on a formula to make possible the payment of average earnings, rather than base rates for vacations and holidays" had "at most conveyed a vague suggestion of the possibility that at some indeterminate date the Employer might evolve a formula whereby these benefits could be increased. This, we believe, falls short of the type of promise contemplated by the Act." That type of promise is the type made in the present case of specific increases and benefits which would be received by the employees not later than specific dates set by the Respondent (on the basis of its estimate of when a new election might be held).

[10] *NLRB v. Pandel-Bradford, Inc.*, 520 F.2d 275, 280 (1st Cir. 1975), enfg. 214 NLRB 736 (1974). A benefit is not predetermined and fixed if the employer is not legally committed to it; fixing the legal commitment immediately prior to the election violates Sec. 8(a)(1). *NLRB v. Arrow Elastic Corp.*, 573 F.2d 702 (1st Cir. 1978), enfg. NLRB 110 (1977). The employer in *Arrow*, like the Respondent herein, "wanted to remind [the employees] of the benefits they already had." Id. at 111.

[11] Even if preparations for the change in employee benefits were deemed to have been made prior to the actual preelection period, the timing of the announcement in response to the union campaign and within the period violates the Act. *Montgomery Ward & Co.*, 220 NLRB 373, 374 (1975), enfd. as modified 554 F.2d 996 (10th Cir. 1977).

was not a motivating factor in the implementation of the wage increases and the tuition reimbursement program.

The contention that the Respondent was attempting to be competitive with the wage packages of competing nursing homes runs afoul of Stern's admission that tuition programs at other nursing homes had not been looked into and Milano's outright disclaimer of any role in fixing nurses' salaries. She even professed to have only "basic, very basic knowledge" of the policy regarding wage increases and claimed to be "completely guessing" when she testified that she thought the policy was to grant automatic wage increases to registered nurses at 6 months and 1 year from the date they were hired. According to her testimony, though she was director of nursing services, her discussions with the administrator about wage increases for the nurses were general discussions, and she played no role in determining how much of an increase they received in July, did not know how much was actually given to them, did not know the dates of the increases which had been granted prior to July 1981, and could not recall if increases were granted after July 1981. At the same time she gave a picture of active involvement when she testified that she had last reviewed the registered nurses' package in July 1981 thus indicating that she should have had some familiarity with it); that it was under review at the time of the hearing (August 1982) but she had not, however, had meetings with the nurses about it thus far in 1982; that there is no specific policy on increases or on meetings; that wage review is annual and periodical; but that since both Stern and she had been on vacation it had not yet been done in 1982.

Testimony of this type does not square with Milano's forthright assertion that wage increases in 1981 and 1982 were essential to keep the Respondent competitive and contradicts her testimony that she had no role in fixing the nurses' salaries. Stern also contradicted her testimony by his own testimony that the decisions to grant wage increases were arrived at in discussions between himself and Rosenbaum, and that he advised Milano when the meetings were to be held and of their outcome.

The inability of the Respondent to explain the timing of the institution of the wage increases and the tuition reimbursement program, after extended delays, cannot be better demonstrated than by Stern's testimony—or lack of testimony—on that point:

> Q. When was the first time that you spoke with Ms. Milano about a tuition reimbursement plan?
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> A. Who remembers?
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> Q. And you testified that you had heard about this from Ms. Milano for a long period of time, and she also had testified that she had come to you . . . . had come to you, I believe she testified, for a couple of years before July of 1981—
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> A. It was a constant topic of conversation, yes, that she would like to see a tuition reimbursement package.
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> Q. Okay, so what made you decide in July of 1981, at that point, after hearing about it for two years, that you wanted to implement this tutition reimbursement plan?
>
> A. Okay, let me explain it to you. When you sit down and you come up with a package, and you increase pay, sometimes you increase benefits, also—you assess what you're giving, and you try to see if you can afford to give a little more, and if you'd like to give a little more—you could ask me the same question, at the same time in July, we added to our health program a dental program, a dental reimbursement program—you could ask me the same question, what made me see fit in July to give a dental program.
>
> JUDGE LAWRENCE: He's asking you the question.
>
> THE WITNESS: And the answer is, we sat down and we discussed it, and we said what else can we give? What else would we like to give? And we said, okay, we'll give it to them, period.
>
> JUDGE LAWRENCE: What made you decide, though, in July, that this is—after two years of mulling about it, you decided in July, to give it to them, and Mr. Castagna is saying, what triggered the decision in July, to give it to them. Why didn't you make the decision in June, or May or April?
>
> THE WITNESS: Because that's when we sat down to reassess the whole wage and benefit package.
>
> JUDGE LAWRENCE: Why did you sit down in July, to reassess?
>
> THE WITNESS: Beacuse we felt pressure then, because of the staffing problems at the nursing home, and we felt that we had to come up with something to offer nurses to be attracted to the home and to stay at the home.
>
> JUDGE LAWRENCE: Hadn't you had the same pressures all year long?
>
> THE WITNESS: That's true, but every month, you can't increase salaries. We had given an increase in October, and we saw fit to give another one in July, that's all.
>
> JUDGE LAWRENCE: But we're talking, now, about the tuition program.
>
> THE WITNESS: Yeah, that was part—once we sat down with the wage package and the problem, right—and it was something that we were aware is being done in other homes, we made a decision, okay, let's do it.
>
> Q. (By Mr. Castagna) Now, prior to that decision to—when you were thinking about this tuition reimbursement plan more seriously, had Ms. Milano ever given you a draft of a tuition reimbursement plan?
>
> A. No.
>
> Q. Had you or Ms. Milano ever investigated into another tuition reimbursement plan that was in effect at another nursing home, or another hospital?
>
> A. Not that I recall.

It has been noted that even benefits justifiable from a business point of view may not be husbanded until right before an election. Justifying the timing has been noted to be different from justifying the benefits generally.[12]

[12] *NLRB v. Pandel-Bradford, Inc.*, above.

2. Failure of the Respondent's justification on the basis of policy or past practice

There is no argument about the permissibility of an increase or an announcement of an increase in benefits as part of an established company policy or pattern,[13] nor of wage increases prior to an election granted pursuant to past company practices proved to have been instituted independently of union organizational activities.[14] However, the testimony of Stern and Milano, if accepted at face value, proves that the Respondent increased benefits in spite of, rather than in conformity with, any past practice or policy. They testified that the increases in question were agonized over for a period of *years*, Milano keeping after Stern and Stern putting her off, and that they finally worked out the increases under pressure of a personnel shortage.

Accepting their testimony at face value leaves the Respondent's defense still laboring under another fatal handicap, and that is that they conceded that serious discussion of the wage increases and the tuition reimbursement program began after June 15, 1981, the date of Judge Morris' decision. Prelection increases in benefits, even when consistent with past company practice, may not be granted while objections to a representation election are still pending and unresolved "and the possibility that the Board would direct a second election was indeed real."[15] The present case goes beyond that, for this Respondent granted an increase in wages and benefits with full knowledge that an administrative law judge had already recommended that a new election be held, announced wage increases and new benefits and began implementing the wage increases, and, after the National Labor Relations Board had affirmed the decision and ordered a new election, announced and implemented a tuition reimbursement program and continued the wage increases. The first election had been set aside by the Board for the very same reason that objections were filed in the present instance, the Respondent had promised an increase in benefits, and it is not at all unclear, in the light of the testimony of Stern and Milano about how long their discussions had been going on, that the very promises in issue in this proceeding had not been made prior to the first election. That would bring this case squarely within *Reliable Ambulance Service*, 256 NLRB 1165 (1981), in which the Board stated:

> An employer is not free to carry out an objectionable promise made during the critical period of a first election, and then argue that he is merely implementing a promise made at an earlier time . . . . [T]he implementation of a promise initially made to defeat a union is simply another step in that effort, and is therefore objectionable when undertaken during the critical period of a subsequent election. . . . *Triangle Plastics, Inc.*, 166 NLRB 768, 775 (1967). We therefore find that [the] Employer's announcement and implementation of the profit-sharing plan, made at a time when objections to the first election were still pending and the possibility of a second election was very real, was an objectionable continuation of its earlier objectionable promise. We accordingly set aside the second election.[16]

The possibility of a rerun election, by itself, suffices to preclude the granting of benefits, and it is obvious that the filing of objections raises that possibility. Even Stern expressed the opinion that a second election is always a possibility. Thus, the granting of benefits after the filing of objections and while the hearing is pending is violative.[17]

It is in connection with this aspect of the case that utterly implausible testimony by Stern and Milano severely affected their overall credibility. Their testimony was evasive and seemed to me to be a patent attempt to avoid conceding any awareness that the period from the summer of 1981 to March 1982 was an interregnum between two elections in which circumspect avoidance of violative conduct was especially important. There is an inherent implausibility in professions of ignorance of an impending union election while litigation is pending from an earlier election on the part of persons in positions of responsibility in which they clearly ought to have known about such matters.

Stern conceded that he had become aware in July 1981 that the case had been lost and was on appeal, which he said he thought would take a very long time. He professed to be unable to recall whether he had had any conversation with Milano about Judge Morris' decision of June 15, 1981, or whether he had told her that a second election might be run. When pressed, he commented that the possibility of a second election always existed no matter what happened on the first election. Milano testified that she was not aware of Judge Morris' decision, never discussed it with Stern, and, though she regularly attended management meetings, never heard any discussion at such meetings about Judge Morris' decision. She testified that she first became aware that there was going to be a second election among the nurses in March 1982, the very month in which the election was held, and even then did not discuss the election with Stern or any member of management. In fact, though she had testified at the earlier proceeding, she was not aware that a proceeding respecting the Respondent's alleged unfair labor practices surrounding the first election was still pending. I find such testimony incredible.

Stern's memory improved sufficiently for him to be able to testify more positively that he had not, indeed, discussed the conduct of the election campaign with Miss Milano and she did not participate in it (though she had been active in the 1979 campaign). The lucidity was short-lived. Stern was unable to recall a Board order issued on September 30, 1981, directing the conduct of a

[13] *Northern Telecom, Inc.*, 233 NLRB 1104 (1977).

[14] *Mallory Controls Co.*, 214 NLRB 616 (1974); *Meier's Wine Cellars*, 188 NLRB 153 fn. 6 (1971).

[15] *Northwest Engineering Co.*, above.

[16] 256 NLRB at 1165.

[17] *Triangle Plastics*, 166 NLRB 768, 774 (1967); *NLRB v. Gruber's Super Market*, 501 F.2d 697, 702 (7th Cir. 1974), enfg. in part. 201 NLRB 612 (1973), upholding specifically the Board's determination that wage increases granted pending a hearing on objections were unlawful.

new election but conceded he might have been aware of it at the time. Then he testified that he did not know that an election was going to be conducted because counsel had told him when he was made aware of the June 1981 decision that the decision would be appealed and was not final and the appeal process would take years. Stern even denied having had any discussion with Rosenbaum about Judge Morris' finding that the Respondent had illegally promised to raise benefits to employees. He did not recall any conversation with Rosenbaum about the decision. He was sure counsel was in touch directly with Rosenbaum. Then he contradicted himself. Asked if he had not discussed the matter with Rosenbaum in view of the fact that another election had been ordered, he first said once again that he did not recall discussing it, then he got technical and pointed out that there was no order of election at that point and then he said he was sure he told Rosenbaum of the decision but it was in the lawyers' hands at that time. The lawyers had been the original bearers of the bad tidings to Rosenbaum. Somehow, Stern became the messenger instead.

On cross-examination, Stern finally conceded that he became aware of Judge Morris' decision about "that period of time" (June 15, 1981), and that he read a copy of the decision and thus knew that Judge Morris had found that unfair labor practices had been committed by the Respondent and had recommended that a new election be held.

An exhaustive review into the problems respecting the credibility of these witnesses would be a dismal expenditure of time, but some of their lapses are worth mentioning because they make it clear that the Respondent's explanations for the increases in wages and the institution of the tuition reimbursement program must be rejected.

For example, there was a complete lack of any documentary evidence which would have established that policies and practices were established well before, and independently of, any impending union election. There were no meeting notices or memoranda of substantive discussions so that the dates and times of meetings between Milano and Stern and meetings with the nurses proved to be completely unverifiable. In fact, what Milano referred to in her testimony as "meetings" turned out, in Stern's contemplation, to be nothing more than "conversations in passing" which lasted only 5 or 10 seconds and could not be fixed in time and location. Stern even testified that it would have been impossible to know who attended any particular nurses' meeting because it is impossible to know who was present in the nursing home at any given time. A supervisors' log which purportedly showed notice of the July 1981 meeting contained an entry by Milano notifying the supervisors that there would be a quick meeting in the in-service room to inform nurses of a new insurance company, projected tuition program, and salary increase, but no date or time is given for the meeting and Milano could not say which nurses attended that meeting. She was also unable to say how the supervisors were notified of a meeting purportedly held in December or January. The testimony also showed that, since such meetings were normally held during the day shift, attendance by nurses from the evening and night shifts was rare and there did not seem to be any established mode of communicating the results of such meetings to them. Nurse Griffith could not recall any meeting at which attendance of all the nurses had been required, nor any announcements of meetings in December 1981 or January 1982, nor any reference to such meetings made by any other employee or by any member of management.

If wage increases had been granted in accordance with a preexisting policy or practice, the payroll records should have proved it easily. In this case, institution of the policy could not be proved by the Respondent's computer records because data respecting increases is not, according to Stern, put into the computer records until the increases are actually implemented. Thereafter, proof of the implementation of the policy is dubious by reason of discrepancies which Stern could not explain, which seemed to indicate a failure of uniform application. Nurse Softleigh, hired in March at $9.15, was raised to $9.50 on July 25, but was not raised to $10 until November 28, 8 months after her date of hire instead of the 6 supposedly called for by Respondent's policy. Nurse Mills began working for the Respondent on September 19, 1980. She received a raise to $10 on July 25 since she had been working there more than 6 months. She was due for her annual increase on September 19, but did not receive it until November 28, the same date as Softleigh. Failure to adhere to a professed policy is a factor to be considered.[18]

There were discrepancies in Stern's and Milano's accounts of the development of the tuition reimbursement program.

Milano's testimony conveyed a picture of meetings between her and Stern, while his testimony referred to conferences on the fly in 5-second snatches of conversation. According to her, she and Stern worked out the details of the plan; she told him the nurses were unhappy with the grade requirement and he authorized her to delete it; the plan went into effect without reference to any grade requirement; and she knew of no distinction between the requirements of the two plans. According to Stern, he consulted with Rosenbaum before approving any plan, and, with reference to the elimination of the grade requirement, it was reduced, not eliminated. Stern and Milano even differ in their testimony as to who wrote out the first draft of the reimbursement program.

Stern relied on the unbusinesslike manner in which the program was supposed to have been developed to justify the vagueness of his testimony. When pressed for details about how the original plan, with the grade requirement, had been produced, his answer had been, "We pulled it out of the air. I don't know what to tell you." Later in his testimony, he indicated that it had been produced in between the pressures of a catastrophe-laden business and that development of the program had been in an "off-the-cuff, nonchalant manner, in two sessions, and it's hard to place it in time."

Finally, Milano's testimony respecting the timing of the announcement of the tuition reimbursement program

[18] Failure of the employer to adhere to a professed policy is a factor to be considered. *Montgomery Ward & Co.*, above.

is contradicted by the testimony of several of the nurses. Milano testified that was done in July, but Nurse Mills testified that she did not become aware of the program until she received a paycheck with the announcement of it in January or February 1982, though she conceded that her attendance at nurses' meetings had been poor. Nurse Griffith testified that she first became aware of the plan late in November or December 1981, when the nurses' secretary gave her a copy of the projected plan which contained a "B-plus" requirement. Two weeks before the election, Stern mentioned the program to her. She never received a copy of the plan which deleted the B-plus requirement, thus bringing into question what it was that was distributed.

F. *Conclusion*

The General Counsel proved that, on being put on notice that a second election might be ordered, the Respondent announced a series of wage increases and a tuition reimbursement program and implemented the same during the period in which objections to the first election were being litigated and a new election was scheduled, and I find that all of this was done with the intention of influencing the outcome of the second election. The Respondent failed to dissociate the wage increases and the tuition reimbursement program from that second election. The Respondent failed to offer consistent, credible evidence, either by way of testimony or by way of documentary proof, that it took these steps without awareness of the pendency of a new election, or that such election was reasonably believed to be deferred to a remote point in time, or that the Respondent's purpose was to remain competitive in the quest for competent employees with the other nursing homes in the area.

While none of the nurses who testified described any occasion on which any representative of management made a direct, personal promise of a wage increase or extension of benefits in exchange for a vote against the unions, the rest of the evidence makes it clear that such an indiscretion on the part of management would have been superfluous.

I conclude that all of the Respondent's actions from and after June 15, 1981, were taken in order to affect the outcome of an anticipated second election.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The violations of the Act herein found to have been committed by the Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. American Geri-Care, Inc., the Respondent, is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO and Local 144, Hotel, Hospital, Nursing Home and Allied Health Service Union, Service Employees International Union, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By promising to grant employees benefits not previously enjoyed in order to reward them for voting against the Union and to interfere with their freedom of choice in a second election, if required, the Respondent violated Section 8(a)(1) of the Act.

4. By granting employees wage increases and a tuition reimbursement plan shortly before a pending election in which the employees were to decide whether they wished to be represented by a union, the Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid actions constitute unfair labor practices affecting interstate commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to cease and desist from such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. I shall further recommended that the Regional Director for Region 29 be directed to open and count the ballots cast in the election conducted on March 12, 1982, in Case 29-RC-4765 and prepare and cause to be served on the parties a tally of ballots. If the tally reveals that either Local 6 or Local 144 has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative. However, if the tally shows that neither union has received a majority of the valid ballots cast, the Regional Director shall conduct a new election at such time as he deems the circumstances will permit a free choice of a bargaining representative.

On these findings of fact and conclusions of law and on the entire record considered as a whole, I make the following recommended[19]

ORDER

The Respondent, American Geri-Care, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising, announcing, or implementing wage increases or benefits not previously enjoyed under conditions calculated to influence employees in the exercise of their right to choose freely whether or not they wish to be represented by a labor organization or to reward them for voting against a union, or in any manner to interfere with their freedom of choice in a third election.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its place of business at the Aischel Avraham Nursing Home at 40 Heywood Street, Brooklyn, New York, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[20] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to any alleged violations of the Act not found herein.

IT IS FURTHER ORDERED that the Regional Director for Region 29 be, and he hereby is, directed to open and count the ballots cast in the second election conducted on March 12, 1982, in Case 29-RC-4765 and prepare and cause to be served on the parties a tally of ballots; in the event that the tally reveals that either Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO, or Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO, has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative; but, in the event that neither union has received a majority of the votes cast, according to the tally, the Regional Director shall conduct a new election at such time as he deems the circumstances will permit a free choice of a bargaining representative.